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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO by and through
LAWRENCE G. WASDEN, Attorney
General

Plaintiff,

vs.

SCOTT B. MAYBEE, d/b/a
SMARTSMOKER.COM,
BUYCHEAPCIGARETTES.COM,
AND ORDERSMOKESDIRECT.COM,

Defendant.

Case No.

CV OC 06 17645

VERIFIED
COMPLAINT

BACKGROUND

1. In 1999, the Idaho Legislature found that cigarette smoking presents serious public health concerns to the State of Idaho and to Idaho citizens. Idaho Code § 39-7801(a). Indeed, the Legislature has determined that “[t]obacco is the number one killer in Idaho causing more deaths by far than alcohol, illegal drugs, car crashes, homicides, suicides, fires and AIDS combined,” and that tobacco usage is “the single most preventable cause of death and disability in Idaho.” Idaho Code § 39-5701. The Legislature also determined that youth access to tobacco is a matter of State concern. Idaho Code § 39-5701.

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A.M. _____ P.M. _____
SEP 22 2006
J. DAVID NAVARRO, Clerk
By ABBY TEEL
DEPUTY

2. Noting that the Surgeon General of the United States has also determined that smoking causes lung cancer, heart disease and other serious diseases, the Idaho Legislature found that cigarette smoking presents serious financial concerns for the State of Idaho. Under certain health-care programs, the State may have a legal obligation to provide medical assistance to eligible persons for health conditions associated with cigarette smoking, and those persons may have a legal entitlement to receive such medical assistance. Idaho Code § 39-7801 (a) and (b). Under these programs, the Legislature found, the State pays millions of dollars each year to provide medical assistance to persons for health conditions associated with cigarette smoking. Idaho Code § 39-7801(c).

3. The Idaho Legislature has also concluded that "the prevention of youth access to tobacco products . . . to be a state goal to promote the general health and welfare of Idaho's young people." Idaho Code Section 39-5701. The Legislature further determined that the financial burdens imposed on the State by cigarette smoking should be borne by tobacco product manufacturers, rather than by the State, to the extent that such manufacturers either determine to enter into settlement agreements with the State or are found culpable by the courts. Idaho Code § 39-7801(d).

4. On November 23, 1998, leading United States tobacco product manufacturers entered into a settlement agreement, entitled the "Master Settlement Agreement," with the State of Idaho. The Master Settlement Agreement obligates these manufacturers to pay substantial sums to the State (tied in part to their volume of sales); to fund a national foundation devoted to the pursuit of public health interests; and to make substantial changes in their advertising and marketing practices and corporate culture with the intention of reducing underage smoking. Idaho Code § 39-7801(e).

5. Promptly thereafter, the Idaho Legislature declared that it would be contrary to the policy of the State of Idaho if a tobacco product manufacturers could determine not to enter into such a settlement agreement (nonparticipating tobacco product manufacturers) and thereby use the resulting cost advantage to derive large profits in the years before liability may arise,

without ensuring that the State will have an eventual source of recovery from them if they are proven to have acted culpably. This legislative determination was driven, in part, by the fact that many diseases caused by tobacco usage often do not appear until many years after the affected individual begins smoking. Idaho Code § 39-7801(a) and (f).

6. The Idaho Legislature thus determined that it is in the interest of the State of Idaho to require that nonparticipating tobacco product manufacturers establish a reserve fund to guarantee a source of compensation and to prevent such manufacturers from deriving large, short-term profits and then becoming judgment-proof before liability may arise. Idaho Code § 39-7801(f).

7. Accordingly, shortly after the Master Settlement Agreement was signed, the Idaho Legislature passed the Idaho Tobacco Master Settlement Agreement Act (the Master Settlement Agreement Act). In essence, the Master Settlement Agreement Act requires “tobacco product manufacturers” to either: (1) “[b]ecome a participating manufacturer (as that term is defined in Section II(jj) of the Master Settlement Agreement) and generally perform its financial obligations under the Master Settlement Agreement,” or (2) place into a qualified escrow fund the amounts required by Idaho Code § 39-7803(b)(1) of the Master Settlement Agreement Act.

8. Also, in 1998, to address further the serious health consequences of tobacco, the Idaho Legislature passed the Prevention of Minors’ Access to Tobacco Act (the Minor Access Act), codified at Title 39, Chapter 57, Idaho Code. One way the State has implemented its goal of addressing youth tobacco usage and sales is Idaho Code § 39-5704 of the Minor Access Act. That section prohibits the sale, distribution, or offering of tobacco products at retail without a tobacco permit having first been granted by the Idaho Department of Health and Welfare. Idaho Code § 39-5709 of the Minor Access Act thus declares that the sale or distribution of tobacco products without a permit is “considered by the state of Idaho as an effort to subvert the state’s public purpose to prevent minor’s access to tobacco products.”

9. In 2003, the Idaho Legislature decided that violations of the Master Settlement Agreement Act threatened not only the integrity of Idaho’s agreement with the tobacco

companies, but also the fiscal soundness of the state and public health and responded with procedural enhancements to help prevent such violations through adoption of the Idaho Tobacco Master Settlement Agreement Complementary Act (the Complementary Act), codified at Title 39, Chapter 84, Idaho Code. Idaho Code § 39-8401. Idaho Code § 39-8403(3) of the Complementary Act makes it unlawful for any person to sell, offer or possess for sale in Idaho cigarettes of a tobacco product manufacturer or brand family not included on Idaho's Directory of Compliant Tobacco Product Manufacturers and Brand Families (Idaho Compliant Tobacco Manufacturer Directory).

10. Also in 2003, the Idaho Legislature expanded the scope of the Minor Access Act expressly to include coverage of tobacco product sales over the Internet. *See* 2003 Idaho Sess. Laws. Ch. 273, p. 728. Such sales are defined as "delivery sales" by Idaho Code § 39-5702(2) (Supp.) of the Minor Access Act. The Legislature has made clear that Internet tobacco retailers are subject to all regulation of tobacco sales that exists for the more traditional ways in which tobacco products are sold and used, Idaho Code § 39-5714 (2006 Supp.), including, without limitation, compliance with the Complementary Act.

11. This lawsuit is being filed because Defendant Scott B. Maybee has been warned in writing of his multiple and various violations of Idaho law relating to the sale of tobacco products, but has chosen to ignore and act in defiance of these laws. His unlawful actions, spelled out below, undermine and undercut the Idaho Legislature's stated goals and concerns with respect to tobacco sales and usage. Specifically, Defendant has sold over three million cigarettes in Idaho without obtaining the permit required by the Minor Access Act. Furthermore, a very large portion of his cigarettes sales are of brand families and of manufacturers that are not and have never been on the Idaho Compliant Tobacco Manufacturer Directory. Defendant will continue to violate Idaho law and undermine Idaho's stated goals and policies related to tobacco usage and sales until he is stopped and deterred.

JURISDICTION, PARTIES, AND VENUE

12. This Court has subject matter jurisdiction over the parties and this matter for the relevant time period that is the subject of this Verified Complaint pursuant to the Complementary Act and the Minor Access Act.

13. Pursuant to Idaho Code § 5-514, the Complementary Act, and the Minor Access Act, this Court has personal jurisdiction over Defendant Scott B. Maybee. Specifically, for purposes of Section 5-514, Defendant has transacted business within Idaho. For purposes of the Complementary Act, Defendant is a person who has sold or offered for sale in Idaho over one million cigarettes of tobacco product manufacturers or brand families not included on Idaho's Compliant Tobacco Manufacturer Directory. For purposes of the Minor Access Act, Defendant has sold, or distributed for sale, over three million tobacco products at retail to Idaho consumers.

14. Lawrence G. Wasden is the Attorney General of the State of Idaho. He is authorized, and has the duty, pursuant to Idaho Code §§ 39-5710 (Supp.) 39-8406, and 39-8407 of, respectively, the Minor Access Act and the Complementary Act, to investigate and prosecute violations of these two Acts on behalf of the State of Idaho.

15. Defendant is an out-of-state individual doing business under various names, including smartsmoker.com, buycheapcigarettes.com, and ordersmokesdirect.com.

16. Because Defendant is a non-resident of the State of Idaho venue is proper in this Court pursuant to Idaho Code § 5-404.

FACTUAL BACKGROUND

17. Defendant Scott B. Maybee sells at retail, offers for sale at retail, and ships cigarettes to Idaho consumers. Defendant:

- A. Is not registered to do business in the State of Idaho;
- B. Does not have a registered agent for service of process; and
- C. Does not have a tobacco permit issued by the Idaho Department of Health and

Welfare, as required by Idaho Code § 39-5704 of the Minor Access Act.

18. Defendant has described himself as a “remote tobacco retailer,” and has admitted that he does business, in part, under the names of smartsmoker.com, buycheapcigarettes.com, and ordersmokesdirect.com. These companies are operated out of Defendant’s principal place of business at 255 Rochester Street, Salamanca, New York, 14778.

19. Defendant has described his “remote tobacco retailer” business to mean “that I accept customer orders through the Internet or by phone or mail.”

20. As described by Defendant, each of his retail tobacco sales to Idahoans qualifies as a “delivery sale,” as that term is defined by Idaho Code § 39-5702(2) of the Minor Access Act.

21. Defendant has admitted that “[a]pproximately 75% of my retail [tobacco] sales are to out-of-state purchasers. These sales are completed in the home state of the purchaser once their orders have been delivered through the mails. . . . These out-of-state shipments of cigarettes are not intended for resale in the purchaser’s home state, but are retail sales intended for the purchaser’s use and consumption.”

22. According to reports Defendant has provided the Idaho State Tax Commission, for the time period April 2005 through July 2006, he transacted business in the State of Idaho by selling 3,159,200 cigarettes at retail to Idaho consumers and shipping these cigarettes to individual Idaho consumers. Defendant conducted these retail cigarette sales via his websites smartsmoker.com, buycheapcigarettes.com, and ordersmokesdirect.com.

23. Each of Defendant’s identified websites invites customers to place orders for cigarettes or tobacco products at the website itself or through a phone number, fax number, e-mail address, or U.S. mail address listed on each website.

24. Based upon information and belief, the Idaho consumers who buy cigarettes or other tobacco products from Defendant place their orders directly at one of the websites referenced in paragraph 22 or through a phone number, fax number, e-mail address, or U.S. mail address listed on each website.

25. Based upon information and belief, the cigarettes or other tobacco products ordered from Defendant are delivered by him into Idaho to those Idaho consumers by use of the mail or a delivery service.

26. According to the reports Defendant has provided the Idaho State Tax Commission, he sold and shipped cigarettes and tobacco products to individuals residing in Idaho, including Ada County, Idaho. Based upon information and belief cigarette sales and shipments into Idaho continue to occur.

27. A number of Defendant's cigarette sales violated the Complementary Act. Indeed, of the total 3,159,200 cigarettes that were sold at retail and shipped to individual Idaho consumers during the fifteen-month period described above, 2,280,800 of these cigarettes, or over 72 percent of all of Defendant's cigarette sales, were of cigarettes of brand families and tobacco product manufacturers that were not and are not on the Idaho Compliant Tobacco Manufacturer Directory.

28. Specifically, from April 2005 through July 2006, Defendant sold at retail and shipped into Idaho to Idaho customers 1,663,600 Seneca brand family cigarettes sold in Idaho (1,384,800 were from the smartsmoker.com website; 196,000 were from the ordersmokesdirect.com website; and 82,800 were from the buycheapcigarettes.com website). These cigarettes and the tobacco product manufacturer that manufactures them—Grand River Enterprises—were not included on the Idaho Compliant Tobacco Manufacturer Directory as of the dates of sales. Neither is on the Directory today.

29. From April 2005 through July 2006, Defendant sold at retail and shipped into Idaho to Idaho customers 228,000 Tucson brand family cigarettes sold in Idaho (154,600 were from the smartsmoker.com website; 44,000 were from the ordersmokesdirect.com website; and 29,400 were from the buycheapcigarettes.com website). These cigarettes and the tobacco product manufacturer that manufactures them—Alternative Brands, Inc.—were not included on the Idaho Compliant Tobacco Manufacturer Directory as of the dates of the sales. Neither is on the Directory today.

30. From April 2005 through July 2006, Defendant sold at retail and shipped into Idaho to Idaho customers 193,200 Kingsley brand family cigarettes sold in Idaho (147,200 were from the smartsmoker.com website; 30,000 were from the ordersmokesdirect.com website; and 16,000 were from the buycheapcigarettes.com website). These cigarettes and the tobacco product manufacturer that manufactures them—Sudamax Industria e Comercio de Cigarros, Ltd—were not included on the Idaho Compliant Tobacco Manufacturer Directory as of the dates of the sales. Neither is on the Directory today.

31. From April 2005 through July 2006, Defendant sold at retail and shipped into Idaho to Idaho customers 54,200 Desert Sun brand family cigarettes sold in Idaho (30,800 were from the smartsmoker.com website; 23,400 were from the buycheapcigarettes.com website). These cigarettes and the tobacco product manufacturer that manufactures them—Prime Mover Manufacturing Corporation—were not included on the Idaho Compliant Tobacco Manufacturer Directory as of the dates of the sales. Neither is on the Directory today.

32. From April 2005 through July 2006, Defendant sold at retail and shipped into Idaho to Idaho customers 47,000 Yukon brand family cigarettes sold in Idaho (10,800 were from the smartsmoker.com website; 2,200 were from the ordersmokesdirect.com website; and 34,000 were from the buycheapcigarettes.com website). These cigarettes and the tobacco product manufacturer that manufactures them—Mighty Corp.—were not included on the Idaho Compliant Tobacco Manufacturer Directory as of the dates of the sales. Neither is on the Directory today.

33. From April 2005 through July 2006, Defendant sold at retail and shipped into Idaho to Idaho customers 25,600 Niagara's brand family cigarettes sold in Idaho (9,600 were from the smartsmoker.com website; and 16,000 were from the ordersmokesdirect.com website). These cigarettes and the tobacco product manufacturer that manufactures them—presently Sovereign Tobacco Company—were not included on the Idaho Compliant Tobacco Manufacturer Directory as of the dates of the sales. Neither is on the Directory today.

34. From April 2005 through July 2006, Defendant sold at retail and shipped into Idaho to Idaho customers 23,400 Primo brand family cigarettes sold in Idaho (5,200 were from the smartsmoker.com website; 3,600 were from the ordersmokesdirect.com website; and 14,600 were from the buycheapcigarettes.com website). These cigarettes and the tobacco product manufacturer that manufactures them—presently Makedonija Tabak 2000—were not included on the Idaho Compliant Tobacco Manufacturer Directory as of the dates of the sales. Neither is on the Directory today.

35. From April 2005 through July 2006, Defendant sold at retail and shipped into Idaho to Idaho customers 18,600 Unify brand family cigarettes sold in Idaho (10,600 were from the smartsmoker.com website; and 8,000 were from the buycheapcigarettes.com website). These cigarettes and the tobacco product manufacturer that manufactures them—presently Prime Mover Manufacturing Corporation—were not included on the Idaho Compliant Tobacco Manufacturer Directory as of the dates of the sales. Neither is on the Directory today.

36. From April 2005 through July 2006, Defendant sold at retail and shipped into Idaho to Idaho customers 18,400 Opal brand family cigarettes sold in Idaho (3,200 were from the smartsmoker.com website; 8,000 were from the ordersmokesdirect.com website; and 7,200 were from the buycheapcigarettes.com website). These cigarettes and the tobacco product manufacturer that manufactures them—presently Grand River Enterprises—were not included on the Idaho Compliant Tobacco Manufacturer Directory as of the dates of the sales. Neither is on the Directory today.

37. From April 2005 through July 2006, Defendant sold at retail and shipped into Idaho to Idaho customers 7,800 Mond brand family cigarettes sold in Idaho (7,800 were from the buycheapcigarettes.com website). These cigarettes and the tobacco product manufacturer that manufactures them—presently Concord Tobacco International—were not included on the Idaho Compliant Tobacco Manufacturer Directory as of the dates of the sales. Neither is on the Directory today.

38. In short, the cigarettes listed above were manufactured by tobacco product manufacturers not in compliance with Idaho's Tobacco Master Settlement Agreement Act and Complementary Act and were not listed on the Idaho Compliant Tobacco Manufacturer Directory. In each instance as well, Defendant sold these cigarettes at retail and shipped them into Idaho to Idaho customers without the tobacco permit required by Idaho Code § 39-5704 of the Minor Access Act.

39. Idaho Code §§ 39-5716 through 5717 of the Minor Access Act impose upon tobacco retail sales permittees various disclosure, notice and shipping obligations with respect to delivery sales. Upon information and belief, Defendant did not comply with these requirements. Specifically, on information and belief, Defendant did not (1) post on his websites a prominent and clearly legible statement that his retail sales of cigarettes are taxable under chapter 25, title 63, Idaho Code, and an explanation of how such tax has been, or is to be paid, with respect to such delivery sales, as required by Section 39-5716 of the Minor Access Act; and (2) include as part of the shipping documents a clear and conspicuous statement providing as follows:

TOBACCO PRODUCTS: IDAHO LAW PROHIBITS SHIPPING TO INDIVIDUALS UNDER THE AGE OF EIGHTEEN YEARS, AND REQUIRES THE PAYMENT OF TAXES PURSUANT TO CHAPTER 25, TITLE 63, IDAHO CODE. PERSONS VIOLATING THIS MAY BE CIVILLY AND CRIMINALLY LIABLE.

as required by Section 39-5717 of the Minor Access Act.

40. Accordingly, the Defendant has violated (1) the Complementary Act by selling or offering for sale in Idaho cigarettes of a tobacco product manufacturer or brand family not included on the Idaho Compliant Tobacco Manufacturer Directory; and (2) the Minor Access Act by selling cigarettes at retail to Idaho customers without having possession of the tobacco permit required by Idaho Code § 39-5704 of the Minor Access Act.

FIRST CAUSE OF ACTION—IDAHO COMPLEMENTARY ACT

41. The Attorney General incorporates by reference the allegations contained in the preceding paragraphs.

42. Defendant Scott B. Maybee was notified in writing of his responsibilities as a seller of tobacco products under the Complementary Act. Specifically, Defendant was advised that the Complementary Act prohibits selling and offering to sell to Idaho consumers cigarettes of tobacco product manufacturers or brand families that are not included on the Idaho Compliant Tobacco Manufacturer Directory. Despite receiving such notice, Defendant has declined to stop his illegal sales into Idaho and, pursuant to information and belief, today continues to violate the Complementary Act's provisions by selling various cigarette brand families manufactured by tobacco product manufacturers that are not included on the Idaho Compliant Tobacco Manufacturer Directory. Defendant's tobacco retail sales of cigarettes of tobacco product manufacturers or brand families that are not included on the Idaho Compliant Tobacco Manufacturer Directory violate Idaho Code § 39-8403(3) of the Complementary Act.

43. Idaho Code § 39-8406(1) of the Complementary Act states that each sale or offer to sell of a cigarette in violation of Idaho Code Section 39-8403(3) of that Act constitutes a separate violation and provides that each sale or offer to sell, and each cigarette possessed in violation of Section 39-8403(3) shall constitute a separate violation. For each violation, the Court may impose a civil penalty in an amount not to exceed the greater of five hundred percent (500%) of the retail value of the cigarettes or five thousand dollars (\$5,000) upon a determination of violation of Section 39-8403(3).

SECOND CAUSE OF ACTION—IDAHO MINOR ACCESS ACT

44. The Attorney General incorporates by reference the allegations contained in the preceding paragraphs.

45. Defendant Scott B. Maybee was notified in writing of his responsibilities as a seller of tobacco products under the Minor Access Act. Specifically, Defendant was advised of Idaho's prohibition of selling tobacco products at retail without first possessing the tobacco permit required by Idaho Code § 39-5704 of the Minor Access Act. He was also advised of his notice and disclosure requirements under the Minor Access Act. Despite receiving such notice, Defendant has declined to stop his illegal sales into Idaho and, pursuant to information and belief

today continues to violate the Minor Access Act by selling cigarettes at retail to Idaho consumers without Defendant possessing the required tobacco permit and without Defendant making the notices and disclosures required by the Minor Access Act. Defendant's retail sales of tobacco products without possessing the tobacco permit required by Idaho Code § 39-5704 of the Minor Access Act is a violation of that section. Defendant's failure to provide the notices and disclosures required by Idaho Code §§ 39-5716 and 39-5717 of the Minor Access Act, are violations of those two sections.

46. Idaho Code § 39-5710(7) (Supp) of the Minor Access Act authorizes the Attorney General to bring an action in District Court to restrain violations of the Minor Access Act by any person.

REQUEST FOR RELIEF

The Attorney General respectfully asks that this Court:

1. Find that Defendant Scott B. Maybee has violated Idaho Code § 39-8403(3) of the Complementary Act by selling or offering for sale in Idaho cigarettes of tobacco product manufacturers or brand families not included in the Idaho Compliant Tobacco Manufacturer Directory.

2. Find that Defendant has violated Idaho Code § 39-5704 of the Minor Access Act by selling to Idaho consumers, at retail, cigarettes without first having received a tobacco permit from the Idaho Department of Health and Welfare, as required by Section 39-5704.

3. Find that Defendant has violated Idaho Code §§ 39-5716 and 39-5717 of the Minor Access Act by failing to make notice and disclosures required by these sections.

4. Find that Defendant's multiple violations of the Complementary Act constitute separate violations thereof; and award judgment against Defendant for civil penalties in the amount of five hundred percent (500%) of the retail value of the cigarettes unlawfully sold, or five thousand dollars (\$5,000) per violation, whichever is greater.

5. Find that Defendant's multiple violations of the Minor Access Act constitute separate violations thereof; and enjoin Defendant Maybee from all retail sales of tobacco products to Idaho


consumers until he obtains a tobacco permit from the Idaho Department of Health and Welfare, as required by Idaho Code § 39-5704. Even upon obtaining such a tobacco permit, restrain Defendant of any subsequent violations of the Minor Access Act's notice and disclosure requirements.

6. Award judgment against Defendant for all of the Attorney General's reasonable costs, expenses, and attorney's fees in bringing this action, as authorized by Idaho Code § 39-8407(5) of the Complementary Act.

7. Award the Attorney General such other, further, or different relief, as the Court considers appropriate.

DATED this 22nd of September, 2006.

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

By 
BRETT T. DeLANGE
Deputy Attorney General
Consumer Protection Unit

VERIFICATION

STATE OF IDAHO

)

) ss.

County of Ada

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SYDNEY DONAHOE, being first duly sworn on oath, deposes and says that she is a Tobacco Compliance Specialist in the Civil Litigation Division of the Office of the Attorney General, that she has read the foregoing Verified Complaint, and that the facts therein are true to the best of her knowledge, information, and belief.

Sydney Donahoe
SYDNEY DONAHOE

SYDNEY DONAHOE
Office of the Attorney General

SUBSCRIBED AND SWORN to before me this 2nd day of September, 2006.

JENNIFER L. BITHELL
NOTARY PUBLIC
STATE OF IDAHO

Serrin L. Bithell
NOTARY

NOTARY

Residence: Meridian, ID

Commission Expires: 11-30-07